

Legal Issues Panel Discussion

Risk Management in Underground
Construction
April 12-13, 2022

Background

- Global economy was just starting to recover from the pandemic – then comes inflation and Russia’s invasion of Ukraine
- Both have impacted the global construction market
- U.S. construction costs are the highest in 50 years
- Contractors and owners feeling the effects of increased construction costs in just about every category
- Continuing issues with availability of materials, price increases, supply chain and other delays
- Economic sanctions against Russia affecting imports and exports – oil, natural gas, metals, food
- Increasing inflation and escalation of construction costs along with materials shortages and supply chain issues can cause project delays and even cancellations – and certainly claims and disputes

Material Price Escalation

- Huge issue in the current environment
- Competing interests – owner wants price certainty, contractor wants owner to take on price escalation or at least participate in it
- With fixed price contracts (including unit prices and even cost reimbursable with a GMP), the contractor typically bears the financial risk of material price increases
- Typical material price escalation provision will acknowledge that the contract price is based on current pricing for required materials, but certain materials may be subject to price increases
- Provision will provide for a price adjustment if the price of the material exceeds an agreed threshold percentage of the contract price or some other agreed formula

Material Price Escalation

- Best strategy – limit to certain materials
- Other options if no price escalation provision:
 - Component of delay damages
 - Change in law if government action, rules, etc. caused the price increase

Force Majeure

- Another huge issue in light of pandemic, war in Ukraine, government sanctions and other actions
- Typical basic FM clause:

“Force Majeure” means any cause or event beyond the reasonable control of the affected Party that is not caused by or attributable to the negligence of the claiming Party, and which by the exercise of due diligence such Party would not have been able to avoid or overcome. Subject to the satisfaction of the foregoing conditions, Force Majeure may include, but is not limited to, any of the following events: war, riot, terrorism, act of vandalism, rebellion, protests, civil disturbances, acts of civil disobedience, epidemic, pandemic, unusually adverse weather, general strikes, fire, explosion.

Force Majeure

- Interpretation issues
 - Is what is going on in Ukraine a “war”?
 - Is the fighting in Ukraine causing energy prices to go up or is it the sanctions in relation thereto?
- FM is typically a defense to non-performance; may not provide for any affirmative recovery
- Don’t assume the FM clause you have always used is sufficient in today’s environment
- Need to tailor it to the specific project, your situation and risks that may arise
- Note that COVID (unless something totally unexpected comes along) is no longer much of a FM argument